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# IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

#### SECOND APPELLATE DISTRICT

## **DIVISION EIGHT**

M.L. et al.,

B240587

Petitioners,

(Los Angeles County Super. Ct. No. CK88841)

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent;

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Real Party in Interest.

ORIGINAL PROCEEDING. Petitions for extraordinary writ. (Cal. Rules of Court, rule 8.452.) Donna Levin, Referee. Petitions denied.

Law Offices of Alex Iglesias, Steven Shenfeld and David Alaynick for petitioner M.L.

Los Angeles Dependency Lawyers, Inc., Law Office of Marlene Furth and Danielle Butler Vappie for petitioner S.O.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, and Kim Nemoy, Deputy County Counsel, for Real Party in Interest Los Angeles County Department of Children and Family Services.

Petitioners M.L. (father) and S.O. (mother) are the parents of D.L., a two-and-one-half-year-old girl who was detained from the home of her parents by the Los Angeles County Department of Children and Family Services (Department) after her two-month-old sister was declared dead under suspicious circumstances. After an autopsy report concluded that homicidal suffocation was strongly suspected, the juvenile court sustained various dependency petition allegations, including an allegation that the parents likely caused the death of the deceased child through physical abuse. The court denied reunification services to both parents and scheduled a hearing for the selection and implementation of a permanent plan (Welf. & Inst. Code, § 366.26) for D.L.1

The parents filed separate writ petitions challenging the juvenile court's decision to schedule a permanent plan hearing. (Cal. Rules of Court, rule 8.452.) They claim substantial evidence does not support (1) the juvenile court's jurisdictional findings, and (2) the juvenile court's decision to deny them reunification services. We disagree with both contentions, and deny the petitions.

#### FACTUAL AND PROCEDURAL BACKGROUND

The family came to the Department's attention on July 5, 2011, one day after an ambulance transported D.L.'s two-month-old sister from the family home to a hospital, where she was declared dead.<sup>2</sup>

The parents did not know what caused the baby's death. Mother stated that she placed the baby in her crib on the night of July 3 before going to sleep next to D.L. Mother was awakened at approximately 6:00 a.m. the following morning when father,

All statutory references are to the Welfare and Institutions Code and all undesignated references to statutory subdivisions are to the subdivisions of section 300.

Because the two-year-old girl who is the subject of the dependency proceeding and her deceased sibling share the same initials, we will refer to the former as D.L. and to the latter as the baby or deceased child.

who had come to check on mother and the children, found the baby unresponsive and began screaming. Father ran to the main house and called 911.<sup>3</sup> Pursuant to instructions he received from the 911 operator, father performed CPR on the baby. Paramedics arrived and transported the baby to the hospital, where she was pronounced dead upon arrival.

In response to Department inquiries, Deputy Coroner Denise Bertone advised that the baby had bruises above her eye, on both cheeks, in the left temple area and on the jaw. Bertone stated the bruises could not have been caused by CPR. According to Bertone, the cause of death was undetermined, but was classified as "suspicious" pending a final autopsy report.

Both parents denied causing the baby's injuries. They claimed the baby had no bruises when mother put her to bed on the night of July 3. According to a Sheriff's Department homicide detective, the parents claimed the bruises may have been caused when D.L. accidentally hit the baby with a baby bottle. However, Deputy Coroner Bertone asserted that the baby's facial injuries were not caused by a baby bottle. She also advised that Dr. Ribe, who performed an autopsy, stated that the baby's injuries were the result of a "high impact punch or slap."

D.L. was clean and appeared well cared for. She was disrobed and showed no signs of physical abuse or neglect.

The Department detained D.L., placed her in foster care, and filed a dependency petition on her behalf. The dependency petition alleged that mother and father had physically abused the deceased child and that D.L. was therefore at risk.

Mother did not work outside the home and the baby was not in day care. She was under the exclusive care of her parents.

The parents and their two children had recently moved in with mother's parents after father lost his job. According to father's petition, the family lived in a converted garage.

At the conclusion of the detention hearing, the juvenile court found a prima facie case for detaining D.L. and ordered that the parents' visits with her be monitored.

In a jurisdictional report filed in August 2011, the Department reported on additional interviews conducted with the parents. According to mother, after feeding the baby and putting her to sleep at about 10:00 p.m., she woke up at the baby's usual 3:00 a.m. feeding time, but the baby was asleep and she did not want to wake her. Mother claimed the baby was breathing at the time because the blanket was moving up and down.

Mother explained that father said something was wrong with the baby when he came to check on the girls in the morning. Mother believed her sister tried calling 911, but an English-speaking neighbor who heard the yelling talked to the 911 operator and relayed instructions to father, who performed CPR. He was still performing CPR when paramedics arrived. The parents followed the ambulance to the hospital, where they were told the baby had been dead for several hours. Mother stated she did not understand how this could be the case because father claimed the baby was still breathing when he handed her to the paramedics.

Father told a Department social worker that when he came to check on his daughters, the baby was having difficulty breathing. He claimed the baby was still breathing when he handed her to paramedics because he felt a little warm air coming from her nose. He claimed her body was still warm.<sup>4</sup> Father stated that paramedics took the baby directly into the ambulance without administering first aid.

A Sheriff's Department detective advised the Department that an unspecified doctor stated the baby's death was consistent with SIDS (sudden infant death syndrome), but the unexplained bruising was a concern.

According to medical records discussed in an investigative narrative signed by Deputy Coroner Bertone on the day the baby died, the parents reported the baby was "pulseless and apneic [not breathing]" when they checked on her in the morning. Paramedics observed rigor mortis and lividity.

The Department's report noted that both Deputy Coroner Bertone and Dr. Ribe who performed the autopsy stated they could not provide additional information until the autopsy report was completed, which was estimated to take anywhere from two to six months.

The Department recommended that the parents receive reunification services "pending the full autopsy report."

The adjudication was continued several times for receipt of the autopsy report.

In late November, the Department advised that the parents had completed parenting classes and were on the waiting list for individual therapy. Their visits with D.L. were being monitored by the maternal grandparents and no problems were reported.

After the autopsy report was received in early December, the court scheduled a contested adjudication for early February. The court directed the Department to provide a supplemental report, including any change in recommendations, based on the results of the autopsy report.

Senior Deputy Medical Examiner, Dr. James Ribe, performed the autopsy one day after the baby's death and signed the autopsy report at the end of November. He noted that the baby had a total of 25 bruises on her face – including on both eyes, cheeks and temples – copious thymic petechiae (small, pinpoint hemorrhages), and possible healing fractures. X-rays of the rib cage revealed multiple healing fractures which were most likely two-to-four weeks old. The radiology consultant stated that "[t]rauma resulting in rib fractures in a full term infant of the stated age . . . and with otherwise normal appearing skeletal structures may be associated with abusive inflicted trauma and is a possibility which should be considered."

The autopsy report opined as follows: "The autopsy did not demonstrate the cause of [the baby's] sudden unexpected death with medical certainty. However, we strongly suspect homicidal suffocation. The reasons include numerous bruises on [the baby's] face which were clearly inflicted, multiple rib fractures and bony injuries of the rib cage, and petechiae of the thymus gland, plus the totality of the autopsy findings and the

circumstances. At the very least, [the baby] was a victim of physical abuse by his caregiver."

In early January 2012, the Department filed a first amended dependency petition. In addition to the allegations contained in the original petition, the amended petition contained an allegation under subdivision (f) – causing the death of a child through abuse or neglect.

Concurrently, the Department advised the court and the parties that it was now recommending that reunification services be denied.

The adjudication took place in early February. After the court admitted the detention and jurisdictional reports, as well as several other documents, the Department called its only witness, Senior Deputy Medical Examiner, Dr. James Ribe. Dr. Ribe, who has served as a senior deputy medical examiner with the Los Angeles County Coroner's Office since 1993 and specializes in the diagnosis of child death, performed the autopsy on the baby. Dr. Ribe observed 25 bruises on the baby's face. He could not say precisely how old they were, but they "appear[ed] to be very recent, meaning minutes to a day or so before death." Dr. Ribe opined the bruises were caused by blunt force trauma, "most likely the human hand." Based on the location of the bruises and the fact that CPR is usually administered post-mortem and therefore does not leave bruises, Dr. Ribe opined that the bruising on the baby's face was not the type of bruising consistent with the administration of CPR.

Dr. Ribe observed bruising to the baby's nose, which was "suspicious for inflicted closure of the nose, which can cause death." According to Dr. Ribe, the numerous petechiae on the thymus gland are not natural. He conceded that such petechiae can be found in SIDS cases, as well as in suffocation cases, "either accidental or imposed." Dr. Ribe stated he has not ruled out SIDS as the cause of death. He added, however, that this statement "should be strongly qualified. Most pathologists would not diagnose sudden infant death syndrome in this situation with these findings."

The baby's stomach contained about one ounce of milk curd, which means the baby died a short time after being fed, "less than 30 minutes, approximately." If the baby

was fed at 10:00 p.m., she could not have suffered bruising from CPR administered at 6:00 a.m. the following morning. Dr. Ribe opined that if the baby was fed at 10:00 p.m., she died between 10:00 and 10:30 p.m. The baby could have sustained bruises to the face due to the administration of CPR at 6:00 a.m. only if the baby was alive at that time and for several hours thereafter.

Dr. Ribe testified that the baby's ribs contained one definite healing fracture, and possible healing fractures to several other ribs. He could not say for certain whether they were intentionally inflicted or accidental, but he determined they were caused by the hands of an adult. Dr. Ribe opined the healing fractures were approximately two-to-four weeks old. He explained that a baby with healing fractures can be fussy, may have trouble sleeping and may experience other problems. However, such a baby may experience no symptoms at all. Such fractures would not likely be identified during a routine doctor's visit. The fractures did not play a role in the baby's death. The existence of the fractures was confirmed by x-rays.

Dr. Ribe explained that he strongly suspected homicidal suffocation based on a host of factors, namely that (1) the baby was healthy and did not have physical injuries – such as a skull fracture or fatal blunt force trauma – that would be expected to cause death, (2) the baby's death was unexplained, (3) the baby had multiple bruises to her face, including nose, (4) the baby had copious petechiae of the thymus gland, which is seen in cases of suffocation, (5) there was post-mortem fluidity in the blood, which is a feature of death by asphyxia, and (6) the baby had healing rib fractures, which indicated there had been a violent event to the baby's chest by an adult.

One of the documents admitted into evidence was a letter written by Dr. Carol Berkowitz, a professor of clinical pediatrics at UCLA, who concurred with Dr. Ribe's opinion that the findings are "highly suspicious of homicidal (intentional) suffocation." She also concurred that the baby's rib fractures "are indicative of physical abuse."

After Dr. Ribe testified, counsel for the parties offered closing arguments.

Counsel for the Department urged the court to sustain the allegations, including the allegation under subdivision (f). Counsel for D.L. joined in the arguments of counsel for

the Department, except that she asked the court to dismiss certain allegations under subdivisions (a) and (b) which alleged that a specific parent physically abused the baby because there was insufficient evidence that a specific parent inflicted the injuries. Counsel for D.L. argued there was enough evidence that the parents' actions caused the death of their baby, who was under their exclusive control. Counsel for the parents each argued there was insufficient evidence to support the allegations.

After hearing argument, the juvenile court stated it was "obvious that this child died non-accidentally at someone's hands." The child died while under the care of her parents, though the court could not say whether it was the mother or father who inflicted the fatal injury. The court then sustained various allegations under subdivisions (a), (b) and (j) – all of which alleged the parents more than likely caused the baby's physical injuries – as well as the allegation under subdivision (f). The court dismissed several allegations under subdivisions (a), (b) and (j), which had alleged that a specific parent caused the baby's injuries.

The contested disposition took place in April. After admitting various exhibits and taking judicial notice of the sustained petition, mother called two witnesses. First, the Department social worker who had been assigned to the case for approximately two months testified that the Department had received no prior referrals regarding the parents and that there were no indications D.L. had been abused. The parents had completed parenting classes and were on the waiting list for individual therapy. The parents appeared willing to participate in services.

The social worker had not observed any of the parents' monitored visits with D.L., but the foster father who had monitored recent visits reported that D.L. sometimes acts aggressively towards her parents.

D.L.'s maternal grandfather testified that he had been present for most of D.L.'s visits with her parents. He testified that D.L. hugs mother and calls her "Ma Ma." He has never seen D.L. act aggressively towards mother during these visits.

Counsel for the Department and counsel for D.L. argued against reunification services for the parents, claiming the parents had not demonstrated services would be in D.L.'s best interests. Counsel for the parents asked the court to order services.

The court declined to order reunification services because "[t]his is [a subdivision (f)] case." After declaring it was in D.L.'s best interests to not order reunification services, the court scheduled a hearing for the selection and implementation of a permanent plan for D.L.

Mother and father filed separate writ petitions challenging the juvenile court's decision. They each claim that substantial evidence does not support (1) the juvenile court's jurisdictional findings, and (2) the juvenile court's decision to deny them reunification services. The Department filed an answer opposing the granting of relief.

#### **DISCUSSION**

### 1. The Standard of Review.

We review the juvenile court's findings of fact under the substantial evidence test, which requires us to determine whether there is reasonable, credible evidence of solid value to support the order. (*In re Brian M.* (2000) 82 Cal.App.4th 1398; *Curtis F. v. Superior Court* (2000) 80 Cal.App.4th 470.) In so doing, we must resolve all conflicts in support of the court's determination and indulge all legitimate inferences to uphold the

The minute order from the disposition hearing states that the juvenile court denied reunification services under section 361.5, subdivision (b)(6), which provides that services need not be offered where "child has been adjudicated a dependent pursuant to any subdivision of Section 300 as a result of severe sexual abuse or the infliction of severe physical harm to the child, a sibling, or a half sibling by a parent or guardian, . . . and the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent or guardian." However, as both parents recognize in their respective petitions, the juvenile court denied services under section 361.5, subdivision (b)(4), which, as discussed more fully below, provides that services need not be offered where the court finds that that "parent or guardian of the child has caused the death of another child through abuse or neglect."

court's order. If substantial evidence exists, we must affirm. (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1020-1021; *In re Rocco M.* (1991) 1 Cal.App.4th 814, 820; *In re Katrina C.* (1988) 201 Cal.App.3d 540, 547; *In re Tracy Z.* (1987) 195 Cal.App.3d 107, 113.)

Whether the court made the correct decision based upon its findings of fact is reviewed under the abuse of discretion standard. (*In re Brian M., supra*, 82 Cal.App.4th at p. 1401, fn. 4; *In re Brequia Y.* (1997) 57 Cal.App.4th 1060, 1068.)

# 2. <u>Substantial Evidence Supports The Juvenile Court's Jurisdictional Findings.</u>

The juvenile court found that D.L. was a child as described in subdivisions (a), (b), (f) and (j). Both parents claim substantial evidence does not support the findings under either of these subdivisions.

a. Subdivision(f) - Death of Another Child.

We begin with subdivision (f) because the juvenile court's decision to deny reunification services hinged on its finding that D.L. came within the juvenile court's jurisdiction under that subdivision. This requires us to determine whether there is

Subdivision (a) provides in pertinent part: "The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian." Subdivision (a) goes on to provide that "a court may find there is a substantial risk of serious future injury based on . . . a history of repeated inflictions of injuries on the child or the child's siblings . . . ."

Subdivision (b) provides in pertinent part: "The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness . . . ."

Subdivision (f) provides: "The child's parent or guardian caused the death of another child through abuse or neglect."

Subdivision (j) provides in pertinent part: "The child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions."

substantial evidence to support the finding that the parent's "caused" the baby's death "through abuse or neglect."

Both parents argue the juvenile court's finding is unsupported. Father argues that the phrase "neglect" in the statute requires criminal negligence, not merely the type of negligence that would support civil liability. This contention lacks merit. First, the Department's evidence tended to show that the baby's death was due to intentional suffocation, not merely the result of neglect. The Department focused on the abuse prong of subdivision (f), not the neglect prong. Second, in In re Ethan C., supra, \_\_\_ Cal.4th \_\_\_ [2012 Cal. Lexis 6358, pp. \*27 to \*55], our Supreme Court rejected this very contention. The court found "nothing in section 300(f)'s language, history, or policies" requiring "a higher degree of negligence than is required to establish negligent default on a mere civil issue." (Id. at p. \_\_\_ [2012 Cal. Lexis 6358, p. \*27.) The court observed "the Legislature could rationally conclude that when a parent's or guardian's negligence has led to the tragedy of a child's death, the dependency court should have the power to intervene for the safety and protection of children remaining in the parent's or guardian's custody, even if the parent's lethal carelessness cannot necessarily be characterized as sufficiently 'gross,' reckless, or culpable to be labeled 'criminal.' " (*Id.* at p. [2012] Cal. Lexis 6358, p. \*52].) The court then held that, "for purposes of a dependency adjudication under section 300(f), the neglect by which a parent or guardian 'caused the death of another child' may include the parent's or guardian's breach of ordinary care, and need not amount to criminal negligence." (Id. at p. \_\_\_ [2012 Cal. Lexis 6358, p. \*54].)

Turning to the meaning of the term "caused" in subdivision (f), the Supreme Court found "no indication that the word 'caused,' which has a commonly understood meaning

Before 1997, subdivision (f) provided that the parent or guardian must have been "convicted" of causing the death of another child through abuse or neglect. (*In re Ethan C.* (July 5, 2012, S187587) \_\_\_\_ Cal.4th \_\_\_ [2012 Cal. Lexis 6358, p. \*32], quoting former subd. (f), as adopted by Stats. 1987, ch. 1485, § 4, p. 5603, italics omitted.)

in both criminal and civil law, was used in a special or different sense in section 300(f)." (*In re Ethan C., supra*, \_\_\_ Cal.4th at p. \_\_\_ [2012 Cal. Lexis 6358, p. \*60].) The court held that "[o]ne's wrongful acts or omissions are a legal cause of injury if they were a substantial factor in bringing it about." (*In re Ethan C., supra*, \_\_\_ Cal.4th at p. \_\_\_ [2012 Cal. Lexis 6358, p. \*60].)

The court also held that under subdivision (f), the juvenile court is not required to find based on independent evidence that the child is currently at risk arising from the parents having caused the death of a child. (See *In re Ethan C., supra*, \_\_\_\_ Cal.4th at p. \_\_\_\_ [2012 Cal. Lexis 6358, pp. \*55 to \*61].)

In this case, there is substantial evidence to support the juvenile court's finding that the parents "caused" the baby's death by abuse or neglect. Although the report stated that the autopsy did not establish the cause of the baby's death "with medical certainty," such certainty is not required. The autopsy report stated that homicidal suffocation was "strongly suspect[ed]." In his testimony at the adjudication, Dr. Ribe stated that there was a "strong suspicion of homicidal suffocation." Dr. Dr. Carol Berkowitz, the UCLA professor of clinical pediatrics, also opined that the autopsy findings were "highly suspicious of homicidal (intentional) suffocation." The only alternative theory for the baby's death was the one suggested by the defense – SIDS. However, Dr. Ribe opined that most pathologists would not conclude the baby died as a result of SIDS.

When one adds the undisputed evidence that the baby was physically abused and was in the parents' exclusive care at all relevant times, as well as the parents' questionable claim that the baby was alive on the morning of July 5, we cannot say the juvenile court had no basis to conclude the parents likely caused the baby's death.

b. Subdivisions (a), (b) & (j) – Substantial Risk of Harm.

The juvenile court's findings under subdivisions (a), (b) and (j) are also supported by substantial evidence. Even if the cause of the baby's death could not be established with absolute certainty, there was substantial evidence that the baby had been physically abused. Both Dr. Ribe and Dr. Berkowitz claimed the baby's rib fractures were indicative of physical abuse. Dr. Ribe also opined that the multiple bruises on the baby's

face were caused by blunt force trauma – most likely the human hand – and he rejected the notion that the bruises could have been caused by the CPR father administered on the morning of July 5. The possibility that the baby could have sustained bruises when she was hit by a baby bottle was also rejected.

Even though there was no evidence that D.L. had been abused, there was sufficient evidence to support the juvenile court's finding that there was a substantial risk she would suffer serious physical harm based on the physical abuse inflicted on her deceased sibling. Subdivision (j) specifically requires a finding of risk based on past abuse of a sibling, while subdivision (a) permits such a finding. And although subdivision (b) does not expressly reference abuse to a sibling, it authorizes juvenile court jurisdiction where there is a future risk of serious physical harm. As the Court of Appeal stated in *In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1135 (disapproved on another point as stated in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6) while discussing subdivision (b), "[i]n determining whether the child is in present need of the juvenile court's protection, the court may consider past events." (*In re Petra B.* (1989) 216 Cal.App.3d 1163, 1169.)

Thus, substantial evidence supports the juvenile court's jurisdictional findings under subdivision (a), (b) and (j).

# 3. <u>Substantial Evidence Supports The Juvenile Court's Decision to Deny</u> Reunification Services.

Under section 361.5, subdivision (b)(4), reunification services need not be provided when the juvenile court finds by clear and convincing evidence that "the parent or guardian of the child has caused the death of another child through abuse or neglect." Indeed, where such a finding is made, the court is precluded from ordering reunification services unless it "finds, by clear and convincing evidence, that reunification is in the best interest of the child." (§ 361.5, subd. (c); see also *In re Ethan C., supra*, \_\_\_\_ Cal.4th at p. \_\_\_\_ [2012 Cal. Lexis 6358, p. \*39].)

Even though the juvenile court must make its determination based on clear and convincing evidence, appellate courts ignore that standard when deciding whether there is sufficient evidence to support the juvenile court's finding. " " "The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.' [Citations.]" [Citation.] Thus, on appeal from a judgment required to be based upon clear and convincing evidence, "the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong." [Citation.] " (In re Mark L. (2001) 94 Cal.App.4th 573, 580-581, quoting Sheila S. v. Superior Court (2000) 84 Cal.App.4th 872, 880-881, brackets and ellipsis in original.)

In this case, the juvenile court found at the adjudication that the parents had caused the baby's death through abuse and, as discussed above, substantial evidence supports that finding. In light of this finding, the court reasonably could have denied reunification services.

#### **DISPOSITION**

The writ petitions are denied on the merits. This opinion is final forthwith as to this court. (Rule 8.490(b)(3).)

#### NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

	Rebri, v.	
We concur:		
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BIGELOW, P. J. FLIER, J.

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